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Determining applicable law in light of VEB v BP

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Introduction

Establishing international jurisdiction in the event of investor damage due to misleading information has been the subject of many proceedings in recent years. The most outstanding case in this regard is the judgment of 12 May 2021 of the European Court of Justice (ECJ) in *The Dutch Shareholders Association (VEB) v British Petroleum (BP)*.[(1)]

The *VEB v BP* case dealt with the localisation of the place where the damage occurred in accordance with article 7(2) of regulation (EC) No. 1215/2012 (Brussels I-bis). The ECJ held that, in the case of a listed company, only the jurisdiction of the courts of the member states in which that company has complied with the statutory reporting obligations (for the purposes of its listing on the stock exchange) can be established based on the place where the damage occurred. According to the ECJ, it is only in those member states that such a company can reasonably foresee the existence of an investment market and incur liability.

The question of whether and to what extent the *VEB v BP* ruling can also serve as a guideline for the determination of the applicable law based on regulation (EC) No. 864/2007 (Rome II) was still unanswered. However, in a recent procedure against Airbus SE[(2)] in connection with an alleged global corruption and bribery scandal, the Amsterdam District Court considered this issue and ruled on 27 July 2022 that the *VEB v BP* ruling can indeed serve as a guideline.[(3)]

Facts

The *Airbus* case concerns a group claim in relation to Airbus' alleged failure to adequately inform investors about an alleged corruption scandal and the global investigation into it, even though senior Airbus officials were (or should have been) aware of:

- the global bribery;
- the probability of success; and
- the enormous financial risk of criminal prosecution and punishment in different jurisdictions.

In misinforming the investors, Airbus acted unlawfully and thus violated its legal information obligations. The alleged damage suffered by the Airbus investors (ie, a sharp decline in share value) qualifies as pure financial damage. The investors have assigned their claims on Airbus Investors Recovery Limited (AIRL) – a special purpose vehicle.

Before assessing the merits, the Court dealt with the preliminary question of which law is applicable to the investors' claims.

Decision

Applicable law rules of Rome II

The Court first determined that Rome II applies to claims arising on or after 11 January 2009. Three articles are relevant in this respect:

- Pursuant to article 4(1) of Rome II, the law applicable to a tort is the law of the country where the damage occurs, regardless of:
  - the country in which the event giving rise to the damage occurred; and
  - the countries in which the indirect consequences of that event occur.
- Article 4(2) of Rome II provides that if the person whose liability is at issue and the person who suffers damage are both habitually resident in the same country at the time when the damage occurs, the law of that country shall apply.
- Article 4(3) of Rome II provides that if it appears that the tortuous act has a manifestly closer connection with a country other than the one referred to previously, the law of that other country applies.

Link between Rome II and Brussels I-bis

The Court held that claims of Dutch based investors are subject to Dutch law as both Airbus and the investors have their domicile in the Netherlands.[(4)] For the claims of foreign investors, the applicable law is based on the country where the damage occurred.[(5)] Consequently, Airbus claimed that the ECJ's analysis in *VEB v BP* cannot be applied one-to-one when determining the applicable law on the basis of article 4(1) of Rome II.

The Court disagreed and held that it is clear, from the preamble of Rome II, that the interpretation of the provisions in Rome II must be consistent with the substantively same provisions in Brussels I-bis. Brussels I-bis and Rome II contain the same criterion in article 7(2) and article 4(1) respectively (ie, the place where the damage occurred). This means that *VEB v BP* can serve as a guideline for the determination of applicable law.

Mosaic principle leads to applicability of Dutch law

For determining the applicable law on the basis of article 4(1) of Rome II using *VEB v BP*, it must be identified where Airbus has complied (or failed to comply) with its relevant statutory disclosure obligations to the investment market.

Airbus shares are traded on the stock exchange in Germany (Frankfurt), France (Paris) and Spain (Madrid), which poses a practical issue.

If the purchases of shares by investors are considered separately, multiple laws for each of the purchases apply, as two legal systems are designated for each purchase:

- Dutch law applies to the publication obligation as the Netherlands is the country of origin; and
- the law of the country where the shares were purchased (where the market is located) as publication obligations for Airbus also apply in that country.

Thus, according to article 4(1) Rome II, the following laws would be applicable:

- Dutch and German law;
- Dutch and French law; or
- Dutch and Spanish law, depending on the stock exchange on which the shares were purchased.

This so-called mosaic approach cannot lead to an indication of the applicable law to each of the individual transactions since it always indicates two legal systems. Article 4(3) of Rome II does not offer a ready-made solution either, because it assumes that paragraph 1 designates a single legal system. Nonetheless, the Court considers that if paragraph 1 designates two legal systems, the application of the criterion of article 4(3) of Rome II is to identify which of these two legal systems has the closest connection with the tort or delict.

In *AIRL v Airbus*, the Court concluded that the closest connection was with the Netherlands. It considered the following circumstances relevant:

- Airbus was established in the Netherlands and, as such, is legally subject to Dutch law. It is supervised by the Dutch Financial Market Authority (AFM), and regulated information must be published in the relevant registers of the AFM.
- Airbus fulfilled its disclosure obligations in other member states (France and Germany) by complying with Dutch regulations. As a result, Airbus itself stated (and explained in its annual statements) that the supervision by the AFM is superordinate and therefore more important than the supervision by other supervisors.
- Based on article 4(1) Rome II, the Netherlands is, in all cases, one of the two countries whose law would be applicable. In view of these circumstances, it was therefore foreseeable that Airbus could be sued in the Netherlands for claims arising from a violation of its disclosure obligations.

The circumstances put forward by Airbus were considered less relevant by the Court, these being:

- many investors are not established in the Netherlands;
- Airbus has many employees in France; and
- Airbus carries out a large part of its activities there.

The same holds true for the fact that the investors claims are bundled and assigned to an entity that is not incorporated in the Netherlands. Therefore, the conclusion was that Dutch law applies to all the claims against Airbus.

Comment

Determining the applicable law in cross-border collective redress cases can be quite a puzzle. Courts often must deal with situations where no one-size-fits-all solution is available. If the foreseeability requirement is met, a pragmatic approach could offer the desired solution. If such an approach could lead to a uniform application of applicable law, it has the potential of reducing costs and duration of litigation, as well as minimising the risk of diverging outcomes.

The universal application of Dutch law in the present case is comprehensible. It is also in line with the solution suggested by article 4(3) of Rome II in these types of situations; to connect to the place of registered office of the issuing company (in the case of Airbus, the Netherlands).

The Court saw no reason to refer questions to the ECJ for a preliminary ruling as requested by Airbus. Airbus is also not allowed to file an interim appeal against the Courts decision. The merits of the case are now ready for take-off.

For further information on this topic please contact Jeffrey Kleywegt at AKD by telephone (+31 88 253 5000) or email (jkleywegt@akd.nl). The AKD website can be accessed at www.akd.nl.

Endnotes

(1) ECJ 12 May 2021, ECLI:EU:C:2021:377 (*VEB v BP*).

(2) The statutory seat is in Amsterdam.

(3) Amsterdam District Court 27 July 2022, ECLI:NL:RBAMS:2022:4344 (*AIRL v Airbus*).

(4) Article 4 (2) of Rome II.

(5) Article 4(1) of Rome II.